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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HECTOR DELAROCHA, Defendant and Appellant.	E068186 (Super.Ct.No. FSB1300798) OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill, Judge. Affirmed.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Hector DeLaRocha committed lewd acts on a 14-year-old girl. Pursuant to a plea agreement, defendant pled guilty to one count of committing a lewd act upon a child (Pen. Code, § 288, subd. (c)(1)).[1] In return, the remaining allegations were dismissed, and defendant was placed on formal probation for a period of three years on various terms and conditions of probation, including "[n]ot [to] associate with females under the age of eighteen (18); unless in the presence of a responsible adult who is aware of the nature of your background and current offense and who has been approved by the probation officer."

Defendant violated his probation by associating with his minor daughters. Following a hearing, defendant's probation was revoked, and he was sentenced to two years in state prison with 509 days of credit for time served.

On appeal, defendant contends there was insufficient evidence to support the trial court's finding that he violated his probation by associating with his minor daughters outside the presence of a responsible adult. In the alternative, defendant claims the probation condition prohibiting him from associating with underage females was unconstitutionally vague as applied to him because "the trial court conflated 'associating with' with any contact, intentional or not, and no matter how fleeting." We reject defendant's contentions and affirm the judgment.

[1] All future statutory references are to the Penal Code unless otherwise stated.

II

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Offense*[2]

On May 10, 2012, a report was filed with the Adelanto Police Department alleging that defendant, a 39-year-old male, touched a 14-year-old female on her breast and buttocks. The victim reported that "on two separate occasions the defendant . . . touched her breast over her clothing and on another occasion rubbed the defendant's penis."

The victim explained that she used to hug defendant and that he would move his hands down to touch her butt. On another occasion, defendant moved his hand to touch her breast when she hugged him. She further stated that while standing near a mailbox at their apartment building, defendant asked her if she was a virgin. When she did not answer, defendant moved closer and asked if he could touch her. The victim did not answer, and defendant turned the victim's body so nobody could see her and touched her breast. Defendant then said that he wanted to "touch her pussy" and began to move his hand toward her vagina. The victim moved his hand away.

On a separate occasion, while sitting in defendant's car at a stop sign, defendant put the victim's hand on his erect penis. The victim attempted to move her hand away. However, defendant "would not let her" and she began to rub defendant's penis "on her own." In another incident, defendant messaged the victim on Facebook, asking if she

[2] The factual background of the underlying offense is taken from the probation report.

"'wanted his dick.'" The message was not recovered from defendant's Facebook account. The victim admitted she initially liked the attention she received but then started to feel like it was wrong.

On her eighth grade graduation, defendant sent the victim a text message stating that she was a woman now. She responded that she was only 14 years old. Defendant replied by telling her she was a woman to him and asked her if she "'wanted his dick.'" She told defendant that she had a boyfriend and that defendant should not be talking to her like that. She admitted to once sending a text to defendant stating she was out of the shower and all wet. Defendant responded by saying the victim was making him hard.

On January 1, 2013, defendant contacted the San Bernardino Police Department and corroborated the victim's allegations.

On April 12, 2016, an information was filed charging defendant with four counts of committing lewd acts upon a child (§ 288, subd. (c)(1)).

On July 7, 2016, pursuant to a plea agreement, defendant pled guilty to one count of committing a lewd act upon a child. In return, the remaining three counts were dismissed, and defendant was promised three years of probation.

On September 1, 2016, the trial court placed defendant on formal probation for a period of three years on various terms and conditions of probation, including serving 365 days in county jail with credit for time served. As a condition of probation, defendant was also ordered to "[n]ot associate with females under the age of eighteen (18); unless in the presence of a responsible adult who is aware of the nature of your

background and current offense and who has been approved by the probation officer." In addition, defendant was ordered to wear a "Global Position System" (GPS) monitoring device as directed by his probation officer. Defendant objected only to the GPS monitoring condition, and accepted and agreed to the remaining conditions of probation. Defendant also indicated he was willing to abide by all of the terms and conditions of his probation. Over the defense's objection, the court imposed the GPS monitoring condition.

Defendant was prohibited from living with his wife and his two teenage daughters because his wife was in denial of defendant's offenses and thus not approved to be a responsible adult.

On February 14, 2017, a petition to revoke defendant's probation was filed alleging that defendant violated the terms and conditions of his probation by associating with female minors. A formal probation revocation hearing was set.

2. *Probation Violation Hearing*

The formal probation revocation hearing was held on April 21, 2017. At that time, two probation officers, defendant, and defendant's wife testified.

Probation Officer Charlton explained that in October 2016, the probation department placed a GPS device on defendant. Defendant subsequently informed her that he was working days and sleeping in his car.

In January 2017, Probation Officer Charlton began tracking where defendant was staying and sleeping. During that time, Probation Officer Charlton located defendant to

be very close to his wife's house. Defendant and his wife had two daughters, ages 14 and 15.

Probation Officers Charlton and Valdivia had not approved defendant's wife as a responsible adult to supervise defendant under the probation term limiting defendant's association with females under the age of 18, because she did not know the factual circumstances of the offense and blamed the victim during her initial interview. Probation Officer Charlton explained that she spoke to defendant's wife twice and informed her that defendant could not have any contact with any females under the age of 18. She also advised defendant's wife that she would need to come into the probation office to be interviewed as a responsible adult and that she would need to understand all of the circumstances of the case. Probation Officer Valdivia stated that he assisted Probation Officer Charlton in speaking with defendant's wife as a Spanish interpreter because defendant's wife did not speak English.

The first time Probation Officer Charlton spoke with defendant's wife, Probation Officer Charlton told her that she needed to speak with defendant and have him explain to her why he was on probation. When Probation Officer Charlton again spoke with defendant's wife, defendant's wife stated that she had spoken to defendant and that "the victim had come onto him and that it wasn't his fault." Probation Officer Charlton told defendant's wife that she needed to go back to defendant and ask him again about what was occurring between defendant and the victim. Probation Officer Charlton then

rescheduled several appointments for defendant's wife to be interviewed. Defendant's wife did not appear for the subsequent rescheduled interviews.

Probation Officer Valdivia concluded that defendant's wife was not a responsible adult to supervise defendant because she did not know the facts of the case or she felt defendant did not do anything wrong. Probation Officer Valdivia did not believe that defendant's wife could properly supervise defendant "around friends, around her children, around friends that are going to come over to the house the same age of the victim." Probation Officer Valdivia acknowledged that there was no evidence that defendant abused his daughters.

On February 8, 2017, at about 5:00 p.m., Probation Officer Charlton and her partner went to defendant's wife's apartment to conduct a home visit. While Probation Officer Charlton approached and knocked on the front door of the apartment, her partner went to the back door. As one of defendant's daughters answered the front door, defendant attempted to get out of the back door and was apprehended by Probation Officer Charlton's partner.

Defendant's wife testified that she had called defendant over to the apartment because she was out of a job and needed help in doing her income tax online. Defendant arrived first and their daughters arrived a few minutes later from school at about 5:30 p.m. Defendant's wife explained that she was falling asleep when her daughters came home and that defendant was finishing up and was going to sit outside to charge his GPS device. Defendant's wife stated that defendant had told her the victim had come

onto him. Defendant's wife did not think defendant was at fault for the crime but did not know.

Defendant testified that he was at the apartment because his wife had called him over to fill out paperwork for her housing, taxes, and a work application. Defendant stated that he worked at the apartment for three to four hours, alone in the apartment with his wife, and that his two daughters arrived at the apartment around 5:30 p.m. as he was finishing his work. Defendant was going to step outside and charge his GPS device, then leave to his car. Defendant did not hear the probation officer at the front door and was not aware probation officers were present until he encountered the second officer outside. Defendant claimed that he had informed his wife the facts of the offense and did not blame the victim. Defendant admitted that he knew he could not be at the apartment when the children were present, but believed he could be there when they were not there.

Following argument from counsel, the trial court found that defendant violated the probation condition limiting association with females under 18 unless supervised by an approved, responsible adult. The court concluded that defendant's wife was not a responsible adult based on her testimony. The court noted, "Based on the term[s] and condition[s] of probation, when the daughters arrived home, the defendant was obligated to leave the premises forthwith, right then and there, *no contact*. That was the only choice." Immediately thereafter, the trial court revoked defendant's probation and sentenced him to two years in state prison with 509 days of credit for time served.

On April 24, 2017, defendant filed a timely notice of appeal.

III

DISCUSSION

A. *Revocation of Probation*

Defendant contends that there was no evidence that he associated with his teenage daughters by merely being at his wife's apartment in violation of probation. Specifically, relying on statements made by the prosecutor, the probation officer, and the trial court, he argues that the trial court only found that he had *contact* with his teenage daughters and that there was no evidence or finding that he *associated* with female minors, including his daughters.[3]

"A grant of probation is not a matter of right; it is an act of clemency designed to allow rehabilitation. [Citations.] It is also, in effect, a bargain made by the People, through the Legislature and the courts, with the convicted individual, whereby the latter is in essence told that if he complies with the requirements of probation, he may become reinstated as a law-abiding member of society." (*People v. Chandler* (1988) 203

[3] At the probation revocation hearing, the prosecutor argued, "Your Honor, I believe that the defendant has tried to circumvent all the orders of the Court, all the terms of his probation that had to do with being around children and having *contact* with children under 18, including his own daughters."

In a probation report dated March 15, 2017, the probation officer stated that "The defendant was directed by both the Court and his probation officer not to have any *contact* with female minors under the age of eighteen (18) unless in the presence of a responsible adult. The defendant's wife was interviewed to be his responsible adult however; she did not know the details of the defendant's offense and was denied" that designation.

Cal.App.3d 782, 788; see *People v. Johnson* (1993) 20 Cal.App.4th 106, 109-110 (*Johnson*).)

"In granting probation, the trial court retains jurisdiction of the defendant. During the period of his probation, the probationer remains in the constructive custody of the court and is bound by the terms and conditions of the court's probation order. Customarily, such order is tailored to the rehabilitative needs of that defendant. If the defendant accepts probation and later violates any of the conditions thereof, the court may then revoke its order of probation and impose sentence upon the offending probationer." (*People v. Borja* (1980) 110 Cal.App.3d 378, 382; see *Johnson*, *supra*, 20 Cal.App.4th at p. 110.)

A decision to revoke probation involves two distinct components: (1) a retrospective factual question whether the probationer has violated a condition of probation, and (2) a discretionary determination by the court whether the violation of a condition warrants revocation of probation. (*Black v. Romano* (1985) 471 U.S. 606, 611; *People v. Cotton* (1991) 230 Cal.App.3d 1072, 1081.)

The inquiry upon revocation of probation is not directed to the probationer's guilt or innocence but to performance on probation, that is whether the probationer violated the conditions of probation and if so what does that action signify for future conduct. The focus is whether a probationer has shown he or she can conform his or her behavior within the parameters of the law. (*People v. Beaudrie* (1983) 147 Cal.App.3d 686, 691; *Johnson*, *supra*, 20 Cal.App.4th at pp. 110-111.)

It is the People's burden to show the elements of a violation of probation by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447 (*Rodriguez*); *People v. Perez* (1994) 30 Cal.App.4th 900, 903-904.) The trial court's decision to revoke probation is reviewed under an abuse of discretion standard. (*Rodriguez*, at p. 443.) The trial court has broad discretion in determining whether the probationer has violated probation. (*Ibid*.; *People v. Kelly* (2007) 154 Cal.App.4th 961, 965.) Reviewing courts give "great deference" to the trial court's decision, and "bearing in mind that '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]' [Citation.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) "'[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation.'" (*Rodriguez*, at p. 443, quoting *People v. Lippner* (1933) 219 Cal. 395, 400 (*Lippner*).) "And the burden of demonstrating an abuse of the trial court's discretion rests squarely on the defendant. [Citation.]" (*Urke*, at p. 773.) The trial court's discretion is not abused where revocation is supported by substantial evidence. (*Id*. at pp. 772-773.)

Although the trial court's discretion is very broad, it must make its determination on the facts before it and may not act arbitrarily or capriciously. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 378 (*Zaring*).) The evidence must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981-982; see § 1203.2,

subd. (a).) "The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute." (*People v. Lewis* (2004) 120 Cal.App.4th 837, 852.)

There is substantial evidence in this case to support the court's finding that defendant violated probation. Defendant admitted that he knew he could not be in the home with his teenage daughters because his wife had not been approved by his probation officer as a responsible adult. However, when his daughters arrived home, defendant did not leave. Instead, he continued "finishing up" what he was doing and stated he was going to charge his GPS device before he left. Probation officers caught defendant "trying to go out the back door" when they arrived at the home around 5:00 p.m. Defendant and his wife claimed that their daughters arrived home from school at 5:30 p.m. However, Probation Officer Charlton testified that at about 5:00 p.m., she and her partner went to defendant's wife's apartment to conduct a home visit and, as one of defendant's daughters answered the front door, defendant was attempting to get out of "the back door." A reasonable inference could be made that defendant associated with his daughters for at least 30 minutes before he attempted to leave. Moreover, as pointed out by the Attorney General during oral argument, the amount of time defendant associated with his daughters is not dispositive in this case because defendant admitted being in the apartment with his daughters. Defendant violated the no association with female minor order when he saw his daughters at his wife's apartment with no plans to immediately leave the premises. While defendant's daughters were accompanied by their

mother, the probation office had not preapproved her as a responsible adult qualified to supervise the visit. Defendant's wife did not know the facts of the case. She believed that the victim had come on to him. When Probation Officer Charlton spoke with defendant's wife, defendant's wife stated that she had spoken to defendant and that "the victim had come onto him and that it wasn't his fault." There is no evidence that defendant was unaware of the probation condition. Indeed, the record strongly suggests defendant realized his visit with his wife and daughters violated the probation condition given his attempt to leave out the back door when the probation officers conducted the home visit.

Defendant argues that being "present" in the house with his daughters was not sufficient evidence proving he "associated" with them because "[a]ssociating with somebody and having contact with somebody, however fleeting the contact, are not equivalent." He also asserts that "A contact may occur when people cross paths or merely nod to each other in passing by. Associating with somebody, by contrast, involves a willful act of joining or connecting in some form of relationship or for a common goal." Defendant is mistaken.

Two definitions of "come in/into contact with" are "to touch (something)" and "to see and begin began [*sic*] communicating with (someone)."[4] And, as defendant points

[4] <https://www.merriam-webster.com/dictionary/contact with> (last visited Jan. 9, 2019).

out, one definition of "associate" is "to join as a partner, friend, or companion."[5] Two meanings of "companion" are "one that accompanies another" and "one that keeps company with another."[6] Defendant, by being in his daughters' home with them without a preapproved responsible adult present, was accompanied by, and keeping company with his daughters. Under the circumstances of this case, the trial court could reasonably infer that defendant was "associating with" his minor daughters, rather than being merely "present" with his daughters.

Nonetheless, defendant maintains that "association" as used in the present context should be construed to require "an affirmative act—such as acting in concert with" as used in section 186.22, subdivision (b)(1), which provides a sentence enhancement for defendants that commit felonies "for the benefit of, at the direction of, or in association with" a criminal street gang. Defendant's argument is flawed because of the difference between the intended purpose of the probation condition and the gang enhancement. A criminal statute prohibiting associating with gang members is an attempt to limit contact between potential criminal associates or partners, whereas a probation condition prohibiting a sex offender from associating with minors is an attempt to protect potential victims. (Compare § 186.21 ["It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of

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[5] <https://www.merriam-webster.com/dictionary/associate> (last visited Jan. 9, 2019).

[6] <https://www.merriam-webster.com/dictionary/companion> (last visited Jan. 9, 2019).

criminal gang activity and upon the organized nature of street gangs"] with *Allstate Ins. Co. v. Kim W.* (1984) 160 Cal.App.3d 326, 332 ["Section 288 is intended not just to punish individuals for violating the moral standards of the community, but also to protect infants and children from lewd and lascivious assaults"].)

Furthermore, although defendant argues that the trial court improperly determined that he had improper contact with his daughters, the trial court stated that it found defendant in violation of the condition as "set forth in the [probation] report." The probation report properly stated that defendant was to "[n]ot associate with females under the age of eighteen (18)." The record is, therefore, clear that the court properly understood the terms of the condition at issue and that it used the word "contact" interchangeably with "associate." There is sufficient evidence that defendant understood the terms of his probation conditions and violated the no association with female minors condition anyway. This is not one of those "very extreme" cases requiring appellate intervention. (*Lippner*, *supra*, 219 Cal. at p. 400 ["only in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation."]; *Rodriguez, supra*, 51 Cal.3d at p. 443.)

We conclude the trial court did not abuse its discretion when it found defendant violated a condition of probation. Defendant admitted he knew he could not be in the apartment while his children were present. There is substantial evidence to support the court's determination that defendant violated, at least the literal terms of the no-association order condition of probation.

B. *Constitutional Challenge*

Defendant also contends the probation condition prohibiting him from associating with females under 18 was unconstitutionally vague because the trial court "erroneously equated 'associating with' to mere physical presence in the same space." The People respond defendant's claim is forfeited. In the alternative, the People argue defendant's contention "fails because his actions and testimony show he understood the terms of his probation and chose to violate them."

1. Timeliness of Challenge

Although not raised by either party, initially we find that defendant cannot challenge the terms of his probation on appeal. The trial court placed defendant on probation on September 1, 2016. The judgment entered at that time was a final judgment of conviction from which an appeal properly could have been taken. (§ 1237, subd. (a) [defendant may appeal from a final judgment of conviction or from an order granting probation]; see *People v. Howerton* (1953) 40 Cal.2d 217, 219; *People v. Harty* (1985) 173 Cal.App.3d 493, 500 (*Harty*).)

Defendant had 60 days in which to file a notice of appeal challenging the judgment including the conditions of probation. (Cal. Rules of Court, rule 8.308(a).) Having failed to do so, he cannot now raise matters arising prior to judgment on his appeal from the post-judgment order revoking probation. (*Harty*, *supra*, 173 Cal.App.3d at pp. 500-501.) Even if we assume, for the sake of argument, the validity of the no-

association condition is properly before us, we reject defendant's contention on the merits.

2. Merits

In *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*), the defendant, who was convicted of misdemeanor battery, challenged a probation condition as unconstitutionally overbroad and vague. Our Supreme Court held the claims involved a pure question of law, easily remedied by modification of the condition, and therefore defendant did not forfeit her claim by failing to object in the trial court. (*Id*. at p. 888.)

Sheena K. is controlling. Defendant raises a facial vagueness challenge to the probation condition, presenting a pure question of law. Defendant's claim is, therefore, not forfeited by his failure to raise it in the trial court. In considering the claim, we are mindful that whether a probation condition is unconstitutionally vague is a question of law reviewed de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143; *In re J.H.* (2007) 158 Cal.App.4th 174, 183.)

Defendant asserts "the prohibition against any unsupervised contact with minor females did not exist in the first place," and that his right to due process was violated by "the court's expanded interpretation of 'associate with' as meaning 'contact,' which runs contrary to the common meaning of the words and to case law."

Defendant's position conflates two separate concepts, vagueness and mens rea.[7] As relevant here, the first involves the idea that a probation condition prohibiting conduct related to a category of associations, places, or items (a category condition) may be—but is not always—unconstitutionally vague unless it expressly requires the probationer to know that an association, place, or item is within the category. The second involves the idea that courts may not revoke probation unless the evidence shows that the probationer willfully violated its terms. This mens rea prevents probation from being revoked based on unwitting violations of probation conditions. Courts sometimes confuse the distinctions between knowledge as it relates to vagueness with mens rea principles, and this confusion has led to imprecise or unnecessary appellate modifications of probation conditions.

Trial courts have broad discretion to set conditions of probation to "foster rehabilitation and to protect public safety." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) In the exercise of that discretion, trial courts may prohibit otherwise lawful conduct that is "reasonably related to the crime of which the defendant was convicted or

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[7] Another related concept is the doctrine of overbreadth, which we need not discuss in depth because defendant has not raised it. Suffice it to say, overbreadth involves the scope of a directive while vagueness involves its clarity. Whether the overbreadth doctrine applies in situations, as here, where the challenge to the directive is not based on the First Amendment is an open question. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095-1096, fn. 15.) But to the extent the doctrine applies, it asks whether a prohibition goes too far by """sweep[ing] unnecessarily broadly and thereby invad[ing] the area of protected freedoms."""" (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.) This standard is strikingly similar to the established rule requiring probation conditions that impinge on constitutional rights to be closely tailored to achieve legitimate purposes. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486.) Probation conditions may even "impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.'" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624 (*Lopez*).) But as noted above, if a condition impinges on a constitutional right, the condition must be closely tailored to the achievement of legitimate purposes. (*Sheena K., supra*, 40 Cal.4th at p. 890.)

The vagueness doctrine is concerned with whether a probation condition is sufficiently clear and understandable. (See *Sheena K., supra*, 40 Cal.4th at p. 889.) "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*Id*. at p. 890.) "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions.'" (*Ibid*.)

Consequently, "[t]he vagueness doctrine bars enforcement of '"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [Citation.]' [Citation.] A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to

policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' [Citation.] In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not admitting of 'mathematical certainty,' the language used must have '"*reasonable* specificity."'" (*Sheena K., supra*, 40 Cal.4th at p. 890; see *People v. Moore* (2012) 211 Cal.App.4th 1179, 1184 ["'A probation condition which . . . forbids . . . the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process'"]; *People v. Turner* (2007) 155 Cal.App.4th 1432, 1435 [same].)

Appellate courts have cured unconstitutionally vague category conditions by incorporating a requirement that the probationer know that a particular association, place, or item falls within the prohibited category. (See, e.g., *Sheena K., supra*, 40 Cal.4th at pp. 878, 892 [condition prohibiting defendant from associating with anyone "'disapproved of by probation'" modified to require that "defendant have knowledge of who was disapproved of by her probation officer"]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816 [condition barring gang associations modified to forbid association "'with any person known to [the defendant] to be a gang member'"]; *Lopez, supra*, 66 Cal.App.4th at p. 624, fn. 5 [similar condition modified to forbid associations "'with any person known to [the] defendant to be a gang member'"]; *People v. Garcia* (1993) 19 Cal.App.4th 97, 103 [condition barring association with drug users or sellers modified to

forbid association with "persons [the defendant] knows to be users or sellers of [drugs]"].)

Incorporating this type of knowledge requirement solves the vagueness problem because it narrows the prohibited category in a way that is understandable and meaningful. A condition banning association with all gang members, for example, is vague because probationers may come into contact with people who, unbeknownst to them, belong to a gang. (*Lopez*, *supra*, 66 Cal.App.4th at p. 628.) Such a condition therefore fails to inform probationers in a meaningful way of whom they need to avoid. (See *In re Justin S.*, *supra*, 93 Cal.App.4th at p. 816 [condition "[p]rohibiting association with gang members without restricting the prohibition to *known* gang members is '"a classic case of vagueness"'"].) Modifying such a condition to require probationers to know that the person they are associating with is a gang member informs the probationers that prescience is not required and that they may have everyday interactions with people whom they have no reason to believe are in a gang.

Having concluded that vague category conditions can be made sufficiently precise with a modification requiring the probationer to know that the association, place, or item falls within the category, and having concluded that such a modification is properly made on a case-by-case basis, we turn to discuss the relationship between these modifications and the mens rea required to sustain a probation violation. We do so because defendant's contention here appears to conflate the knowledge requirement used to make a vague category more precise with mens rea principles. Defendant maintains that "the trial court

misconstrued the prohibition on associating with females under 18 outside the presence of a responsible adult as a no-contact condition for the first time at [defendant's] revocation hearing."

"'[T]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" (*People v. Simon* (1995) 9 Cal.4th 493, 519.) Thus, with the exception of certain public welfare offenses (see *ibid*.), "for a criminal conviction, the prosecution [must] prove some form of guilty intent, knowledge, or criminal negligence." (*In re Jorge M.* (2000) 23 Cal.4th 866, 872.)

As previously stated, "A court may not revoke probation unless the evidence supports 'a conclusion [that] the probationer's conduct constituted a willful violation of the terms and conditions of probation.' [Citation.]" (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295.) Thus, willfulness is the mens rea that is implicitly required for a probation violation. (*Ibid*.) "The terms 'willful' or 'willfully' . . . imply 'simply a purpose or willingness to commit the act . . . ,' without regard to motive, intent to injure, or knowledge of the act's prohibited character. [Citation.] . . . Stated another way, the term 'willful' requires only that the prohibited act occur intentionally." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438.) The term also imports a requirement that "the person knows what he is doing." (*In re Trombley* (1948) 31 Cal.2d 801, 807; *People v. Honig* (1996) 48 Cal.App.4th 289, 334-335.) Violations due to circumstances beyond the probationer's control are not willful. (*Cervantes*, at p. 295 [deported probationer did not willfully fail to attend hearing]; *Zaring, supra*, 8 Cal.App.4th at p. 379 [no willful

violation where probationer's tardy appearance due to unforeseen circumstances and not due to "irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court"].)

Here, defendant's own statements and actions show that he understood the term of the no-association condition. With the exception of the GPS monitoring device condition, defendant agreed to the probation conditions, including the condition that defendant "[n]ot associate with females under the age of eighteen (18); unless in the presence of a responsible adult who is aware of the nature of your background and current offense and who has been approved by the probation officer." Defendant also indicated he was willing to abide by all of the terms and conditions of his probation. Moreover, defendant admitted at the probation revocation hearing that he could not be at his wife's home when his minor daughters were there without a responsible adult present. He also acknowledged being in his wife's home when his daughters arrived. There is no dispute that defendant was aware of the ages of his daughters, or that his daughters were minors at the time he associated with them. Furthermore, defendant attempted to flee out the back door when the probation officers appeared at his wife's home to conduct a compliance check. (See *Di Marco v. Greene* (6th Cir. 1967) 385 F.2d 556, 562 ["[R]unning out the back door of the tavern when [a parolee] saw the police officers, is ample proof" he understands what "'associate' means in the parole condition."].) These facts demonstrate that defendant knew and understood that he could not associate with his daughters unsupervised. Accordingly, the no-association condition of defendant's

probation was "sufficiently precise for the probationer to know what [was] required of him, and for the court to determine whether the condition has been violated." (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.)

We disagree with defendant's assertion that the trial court expanded the meaning of the no-association condition when it found defendant had "contact with" his daughters. We also disagree with defendant's claim that the court equated "presence" with "association" or "contact" or that "a happenstance meeting equates to seeing his daughters." First, as previously explained, it appears the court, the prosecutor, and the probation officer used the terms "association with" and "contact with" interchangeably. Second, the meaning of the word "contact" requires more than "association." "Come in/into contact with" is "to touch (something)" or "to see and begin began [*sic*] communicating with (someone)." A definition of "associate" is "to join as a partner, friend, or companion." "Companion" is "one that accompanies another" or "one that keeps company with another." Defendant, by being in his wife's home with his daughters without a preapproved responsible adult present, was accompanied by and keeping company with his daughters. Under the circumstances of this case, the trial court could reasonably infer that defendant was "associating with" his minor daughters, rather than being merely "present" when his daughters arrived home from school, and that defendant understood, and was aware of, the probation condition forbidding his association with minor females, including his daughters.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
Acting P. J.

We concur:

SLOUGH
J.

FIELDS
J.